IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1603

HAROLD J. CARDWELL, Warden,
Ohio Penitentiary,

Petitioner,

v.

ARTHUR BEN LEWIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Was the District Court, as affirmed by the United States Court of Appeals, correct in concluding that admission, in Respondent's state criminal trial, of evidence concerning paint samples taken from defendant's car and microscopically examined by police scientists was in violation of Respondent's Fourth Amendment right where the automobile was seized and impounded by police, without a warrant, from a commercial parking lot some distance from the site of defendant's arrest?[1]

[1] In its Petition for Writ of Certiorari the State of Ohio submitted to this Court a single question. (Petition, p. 2) However,

STATEMENT OF THE CASE

Petitioner's history of the case is fairly stated, but Respondent believes that, while Petitioner's recitation of the facts is accurate, there are some additional points which would contribute to a clearer understanding of the case.

First, it might be helpful to the Court to have a short cast of characters to assist in sorting-out the participants in the events at issue:

Sgt. Wm. Lavery: the Deputy Sheriff for Delaware County, Ohio (the location of the murder) in charge of the investigation. (53A)

Division of Criminal Activities: a branch of the Office of the Attorney General of Ohio called in

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in the brief on the merits, Petitioner has presented four questions. (Petitioner's Brief p. 2) While the Merits-Brief questions are primarily restatement and sub-classification of the Petition question, one matter is raised in Question 1 and argued in sections (1), (2) and (3) and the conclusion of the Merits-Brief (Petitioner's Brief pp. 15, 21, 24 and 36 respectively) which includes an issue not embodied in the Petition for Writ of Certiorari or, for that matter, in the appeal to the Sixth Circuit Court of Appeals.

In essence, Petitioner argues that review of the search and seizure issue in federal court collateral proceedings is estopped by the factual determinations and legal conclusions of the Ohio courts, which Petitioner asserts to have been made upon adequate grounds. In support is cited the case of *La Vallee v. Rose*, 410 U.S. 690 (1973) and a portion of the recent concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Respondent believes the issue to be improperly raised by Petitioner by virtue of Rule 40(d)(2) of this Court and the caselaw. See *Irvine v. California*, 347 U.S. 218 at 129 (1954); *J.D. Case Co. v. Borak*, 377 U.S. 426 (1964); *Local 1976, United Brotherhood of Carpenters v. Labor Board*, 357 U.S. 93 (1957). Counsel had originally intended to raise this matter by motion for the exclusion of the issue from consideration but was advised by the Office of the Clerk of this Court that the better practice would be to footnote the contention in Respondent's brief.

by the Delaware County Sheriff to assist in the investigation of this case. (69-70A)

Clyde Mann & Jim Heise: investigators for the Division of Criminal Activities. (5A & 69A)

David Kessler: an attorney who was Chief of the Division of Criminal Activities and who acted as a special Prosecuting Attorney in the trial of this case. (5A &68A)

David E. Tingley: the attorney initially called by defendant on the day of his arrest. (11-13A)

Paul Scott: an attorney who was called into the case by Tingley and who became trial counsel for defendant. (44-45A)

Next, it may be helpful to elaborate upon the chronology of some of the events leading up to the arrest of defendant and seizure of his car. The body of the murder victim, Radcliff, was found on Wednesday, July 19, 1967. (57A) By the following Monday, July 24, 1967, the investigation of the case had begun to focus upon Mr. Lewis, and Deputy Sheriff Lavery by then was interested in Lewis's car. (54A & 57A) On that date, Lavery went to defendant's place of business, questioned defendant, asked for and was given a description of defendant's car, and had the car pointed out to him by defendant. (54A)

Sgt. Lavery and Mr. Mann again talked with Lewis on September 28, 1967 and "at this time the investigation had focused in on [Lewis] as the prime suspect." (Opinion of District Court, Appendix to Pet. for Cert., p. 40)

On October 9, 1967 (77 days after the July 24th interrogation of defendant at his place of business) Mann called defendant and requested that he appear the following day at the office of the Division of Criminal Activities in Columbus, Ohio. (62A & 64A)

At about 8:00 a.m. on October 10th Sgt. Lavery obtained an arrest warrant for defendant from a Delaware County Municipal Judge and came to Columbus (which is in adjoining Franklin County) for the meeting with defendant at 10:00 a.m. (55A)

Mr. Lewis complied with the request to appear and drove the car in question to the interrogation session, parking it in a commercial parking lot a quarter to a half block from the building where the Division of Criminal Activities office was located. (63A) Sgt. Lavery knew during the questioning of defendant, prior to his arrest, that he had driven the car to the interrogation session. (60-61A)

Defendant was not actually informed of the warrant or placed under arrest until late in the afternoon of October 10th (66A-67A), but he was held in close custody throughout the day. (67A) He was allowed only two communications with persons other than the investigators during the course of the day; about noon, he was permitted to call the trade school where he taught to let them know he would not be able to meet with his class that day (65A), and later he was permitted to call his attorney, Mr. Tingley. (66A) The only time during the day Lewis and his interrogators left the offices of the Division of Criminal Activities was during a brief journey in the afternoon to Lewis's home where Lavery and Heise, in the company and with the consent of the defendant, searched his home for a shotgun. (55A & 66A)

Defendant was finally arrested sometime after 3:30 p.m. on October 10, 1967. (67A) Although they ultimately obtained possession of the claim check and keys to the car, the investigators themselves did not actually have any contact with the car. (8A) It appears that Mr. Mann or Mr. Heise simply called the Columbus Police Department and asked that a wrecker be dispatched to impound the car. (8A) There is conflict in the

testimony of Sgt. Lavery who was, of course, the only actual police official present. In a deposition prior to the hearing on defendant's pretrial motion to suppress, Sgt. Lavery had testified that he had not had "anything to do with the automobile part of this transaction [on October 10th]." (16A) Later, at the motion to suppress hearing, Lavery said he had asked Mann to request the impoundment (15A), but Mann indicated he was not acting under Lavery's orders and that Heise had actually called for the wrecker. (8A)

Sgt. Lavery testified in the evidentiary hearing in the District Court that, at least by the time he obtained the arrest warrant on the morning of October 10th, he already knew the following facts specifically pertaining to the car, in addition to other evidence linking the defendant to the crime:

(1) A witness near the scene of the crime heard shots and then saw a gold colored General Motors vehicle leaving the area.

(2) Lewis owned a gold colored 1966 Pontiac.

(3) The victim's car had been pushed over an embankment by another car leaving paint on the bumper of the victim's car.

(4) The foreign paint was from a gold 1965 or 1966 G.M. car.

(5) Lewis's car was taken to a body shop for body repairs shortly after the day of the killing.

(75-77A)

Despite this information, Lavery "saw no reason for a search warrant," (54A) and intended to seize the car "one way or another." (78A) This was confirmed at the evidentiary hearing by Mann, who testified that he knew "throughout the whole day" (October 10th) that they wanted to seize the car. (73-74A) No search warrant was ever sought or obtained. (54A)

SUMMARY OF ARGUMENT

Respondent believes the Petitioner's organizational concept to be inimical to a clear presentation of the issues as Respondent sees them. For this reason, and because of the close factual and logical affinity of this case and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the argument here will be structured primarily along the lines of Part II of the *Coolidge* majority opinion.

The basic contention here, as in *Coolidge, supra,* is that the warrantless seizure of defendant's automobile was indefensable in the context of the Fourth Amendment to the United States Constitution. Circumvention of the warrant requirement of that amendment in this case was not reasonable, not necessary, and not excused by any exception to the general mandate.

The seizure and search of the automobile from a commercial parking lot was not incident to the arrest of defendant in a downtown Columbus office building inasmuch as it was carried out at a time and place remote from that arrest. The seizure of car keys and parking lot claim check from defendant's person at the time of arrest did not become the legal equivalent of seizing the car itself.

Exigent circumstances, claimed by the State to have necessitated the warrantless seizure of the car, are not supported factually in the record. The police had a period of nearly three months to act upon information they had concerning the automobile, but they did not present it to a magistrate. Defendant knew during this period that he and his car were the subject of police interest but took no steps to remove the car from the jurisdiction. The police had all information bearing upon probable cause to seize the automobile either on or before the time of defendant's arrest but simply neglected to secure a warrant. In any event, the possibility of the removal of the evidence after the defendant was in police custody but before a

warrant could be obtained could have been obviated by the simple expedient of surveillance.

There was no "plain view" issue here inasmuch as neither the arresting officer nor any other police officer ever saw the car on the day of it's seizure. It was simply impounded by a wrecker dispatched by a local police agency at the request of the investigating officer.

This case is not significantly distinguishable from *Coolidge v. New Hampshire, supra.* Petitioner's artificial distinction between public and private property is untenable. The *Coolidge* decision, in the respects in which it was applied to this case by the U.S. District Court and the Sixth Court of Appeals, is not at variance with the law existing at the time of the seizure in question.

A consent to search was not clearly established in the record and cannot, therefor, form the justification for warrantless search. Respondent denies, and is supported in this denial by his counsel at the time, that consent in any form was given for the seizure of the car but contends that, even in the light of the police version of the facts surrounding the turning over of the keys and claim check, the District Court properly found that there was insufficient indication of an informed consent to the seizure.

Finally, the Petitioner's argument that the search here somehow escapes Fourth Amendment scrutiny or, at least, satisfies it because it was merely a "scientific examination of an instrumentality of a crime" is not supported by the facts of the case or the prior caselaw suggested by the Petitioner.

ARGUMENT

THE COURTS BELOW CORRECTLY GRANTED RESPONDENT RELIEF UPON HIS PETITION FOR WRIT OF HABEAS CORPUS BASED UPON VIOLATION OF RESPONDENT'S FOURTH AMENDMENT RIGHTS IN STATE COURT CRIMINAL PROCEEDINGS IN WHICH EVIDENCE WAS ADMITTED RELATING TO PAINT SCRAPINGS TAKEN FROM DEFENDANT'S AUTOMOBILE WHICH POLICE HAD SEIZED WITHOUT WARRANT AND WITHOUT CONSTITUTIONALLY SUFFICIENT JUSTIFICATION FOR THE WARRANTLESS INTRUSION.

While it is perhaps unnecessary, in this forum, to re-emphasize at any length the first principles of Fourth Amendment interpretation, it is well to begin the discussion with the admonition of Mr. Justice Stewart in *Katz v. United States*, 389 U.S. 347 (1967) and reaffirmed in *Coolidge v. New Hampshire*, 403 U.S. 433, 454-5 (1971):

> ". . . Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers*, 342 U.S. 48, 51 [1951], and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-defined exceptions.
>
> *Katz, supra,* at p. 357; citing: *Jones v. United States*, 357 U.S. 493, 497-499 (1958); *Rios v. United States*, 364 U.S. 253, 261 (1960); *Chapman v. United States*, 365 U.S. 610, 613-615 (1961); *Stoner v. California*, 376 U.S. 483, 486-487 (1964).

The warrantless seizure of this defendant's automobile under the circumstances particular to this case was not

brought within the constitutional pale of reasonableness by any of the established exceptions to the warrant mandate, and the evidentiary offspring of that seizure was improperly countenanced in the trial court to the detriment, not only of the defendant, but to the integrity of the judicial process as well. The Fourth Amendment, as applied to the actions of states through the precepts of the Fourteenth Amendment, requires, therefor, the result reached in District Court below and affirmed in the United States Court of Appeals. *Mapp v. Ohio*, 367 U.S. 643 (1961)

A. The "Search Indicent" Exception to the Warrant Requirement Does Not Justify the Seizure of Defendant's Automobile in This Case.

The State of Ohio here argues, as did the State of New Hampshire in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that the search in question is legitimized as an event incident to a valid arrest. Its argument is that, since the officials conducting the interrogation of Respondent on October 10, 1967 in the office of the Attorney General's Division of Criminal Activities gained control of the keys and claim check for his car at the time they finally executed the arrest warrant upon the Defendant, this act of taking constituted the real seizure. They then suggest that, since the taking of the keys and claim check, albeit not the car itself, was contemporaneous in time and place with the arrest, the entire chain of events which followed—the impounding of the car—the taking from the car of paint layer samples for microscopic examination—was justified as "incident" to the arrest. The proposition is based on the premise that possession of the claim check and keys was equivalent to "complete control and dominion over the car"[2] (a contention which

[2] Respondent's Brief p. 22.

Petitioner subsequently withdraws when addressing the question of exigency of circumstances requiring warrantless seizure) and that seizure of these tools of access was, therefore, indistinguishable in a Constitutional sense from seizure of the car itself. Respondent submits that this argument is factually incorrect and that, if applied generally, Petitioner's reasoning would license wholesale disregard of Fourth Amendment values.

The physical objects, the keys and claim check, seized from defendant at the time of his arrest, even if that arrest is assumed to be valid,[3] did not invest the police with the indicia of possession so completely that, by surrendering these objects, defendant surrendered the car. Both objects are merely a means of access—and, for that matter, not an essential or exclusive means—to a physical object that has an integrity quite aside from them. The keys, like the electrical outlet plug of a tape recorder, for example, may to some extent control or limit the operation of mechanical objects but do not thereby consume the identity of the object itself. The parking lot claim check is in the nature of a written document evidencing the short-term lease of physical space to an individual wishing to store certain of his personal property thereon, but it does not, in any sense, invest its possessor with ownership or right of control of the object stored that he did not have without it. In short, the keys and claim check, while symbols of, and mechanical aids to control of the automobile, did not merge with it and become inseparable from it in such a way that seizure of one became seizure of the other. The Fourth Amendment

[3] Respondent, it should be noted, has never conceded the validity of his arrest. In the State courts on direct appeal and in the District Court in his original Petition for Habeas Corpus he raised issues concerning the validity of the arrest. See Issues I and II of Petition for Habeas Corpus (Appendix pp. 30A-31A.) The District Court agreed that the arrest warrant was defective but concluded the officer, nevertheless, had probable cause to arrest. (Appendix to Pet. for Cert. p. 51 Note 12)

is not so crude an instrument as to be unable to make such distinctions.

Petitioner's argument, carried to its logical conclusion, would suggest that if a person was lawfully arrested and a proper search of his person was made in which were found keys to his home, his office, a train station locker, a safety deposit box, his vehicles and perhaps a key to a neighbor's or relative's home, all of these locations represented by the keys would be the legitimate subject of a warrantless search "incident" to the arrest at least to the extent that the searches were related to the reason for which the defendant was arrested. The implications are manifest; in order to enjoy Fourth Amendment protection for his home or other enclaves of privacy the citizen would have to avoid personal possession of any means of entry or use of these entities least he be held to have "constructively possessed" his home and his car in his pants-pocket.

The more important question under the "search incident" exception is whether the police here seized the car itself as an incident of defendant's arrest. Stated specifically, could the police, after questioning and eventually arresting defendant at an office building and upon learning of the presence of defendant's automobile in which they were interested at a nearby commercial parking lot, justifiably, as an incident of the defendant's arrest, call another police agency and ask that agency to go to the parking lot and tow the car to an impoundment area for later search?

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), Justice Stewart reviewed the law of search incident as it applied to cases arising prior to the decision of *Chimel v. California*, 395 U.S. 752 (1969):

> The leading case in the area before *Chimel* was *United States v. Rabinowitz*, 339 U.S. 56 [1950] which was taken to stand "for the proposition, inter alia, that a warrantless search 'incident to a lawful

arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel, supra,* at 760 . . .

. . . [T]his Court has repeatedly held that, even under *Rabinowitz*, [a] search may be incident to an arrest ' "only if it is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest. . . ." ' " *Vale v. Louisiana,* 399 U.S. 30, 33 [1970] quoting from *Shipley v. California*, 395 U.S. 818, 819 [1969] quoting from *Stoner v. California*, 376 U.S. 483, 486 [1964]. (*Emphasis in Shipley.*) Cf. *Agnello v. United States*, 269 U.S., at 30-31 [1926]; *James v. Louisiana*, 382 U.S. 36 [1966]

Coolidge, supra, at p. 456

Here, the spatial relationship between the site of arrest and the location of the seized automobile was, if anything, more remote than it was in *Coolidge*, and none of the special factors which necessitate warrantless intrusion as an incident of a lawful arrest were present. The search cannot, therefor, find its justification in incidence to the arrest.

B. There Were No "Exigent Circumstances" Here Which Counterbalance the Constitutional Preference for Search Warrants.

In considering the arguments raised by Petitioner within the area of the so-called "exigent circumstances" exception to the warrant requirement, as that exception relates to automobiles, it might be well to start with Justice Stewart's reminder that:

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.
>
> *Coolidge, supra,* at p. 461.

As this Court in the *Coolidge* case and the District Court and Court of Appeals in this case demonstrated at length, in order for a warrantless search to be justified under the line of cases following *Carroll v. United States*, 267 U.S. 132 (1925), in which there were found to be "exigent circumstances", two conditions must be shown by the State to be present. First, it must be shown that a warrant could not have been obtained in advance. Second, it must be clear that there was a real, not merely a problematical danger that the evidence would be removed or destroyed if time were taken to obtain a warrant. *Coolidge, supra,* at pp. 458-460. In order to prevail on this issue Petitioner must demonstrate that *both* of these factors were present. Respondent maintains that the courts below correctly concluded that *neither* factor was present in the facts.

Judge Kinneary of the District Court in his opinion, after a detailed categorization of the pertinent automobile search cases (Appendix to Pet. for Cert. pp. 57-59), summarized the facts pertaining to this issue:

> . . . The first condition was not met because the reasons establishing probable cause to search the automobile were known to officers days, if not weeks, prior to its seizure and subsequent search. The second condition was not met because the officers knew the whereabouts of the car prior to its search and seizure. They could have obtained a warrant at any time, including the morning of October 10, 1967 or any time following petitioner's arrest. There was no danger a confederate would remove the vehicle and destroy evidence. The murder occurred July 19, 1967. Petitioner was first interviewed July 24, 1967. He was again interviewed on September 28, 1967. He knew that he was a prime suspect when he was requested to meet with investigators on October 10, 1967. Petitioner had already been afforded ample opportunity to destroy

> the evidence. If there were any further danger that a confederate would destroy evidence following petitioner's arrest, the State had ample opportunity to obtain a search warrant and eliminate the risk.
>
> (Appendix of Pet. for Cert. p. 60)

Contrary to the unsupported assertions of Petitioner, there is no indication in the record whatever that the police did not have general knowledge of the whereabouts of the defendant, his residence, his business locations, and his automobile during the nearly three months, which intervened between the murder and defendant's arrest. Despite ample opportunity to develop, at the evidentiary hearing in the District Court, any facts which might support this theory, the State has offered no testimony to show a lack of knowledge of the location of the car at any time except the early portion of October 10, 1967. Even with respect to that period, there is no indication that the officer's lack of knowledge about the precise location of the car that day was the product of anything other than their own failure to ask Lewis where it was? When asked, he told them where it was.

Petitioner has manufactured a ghost in support of its contention that exigencies of circumstance created a need for warrantless seizure of the car on October 10, 1967. The State constantly alludes to the possibility that some unnamed confederate, notified in some unspecified way by the defendant as he was held in police custody, would come and, without keys or claim check, remove the car before a warrant could be secured.

There is no indication whatever that Respondent had attempted to hide or dispose of his car, despite the fact that he had known for some eleven weeks that the police were interested in it. That Respondent chose to drive this particular vehicle to the October 10th interrogating session to which he had been "invited" and at which he voluntarily appeared certainly bespeaks no plan on his

part to secrete the car in such a way as to frustrate any attempt to secure a warrant for its seizure; on the contrary, it seems to justify the opposite conclusion. The fact that the police had called the day before and "invited" the defendant to come downtown the next day to "talk" to them about the murder they were investigating would seem to indicate very little real concern on their part that the defendant would abscond or otherwise frustrate their investigation.

The fact that Respondent, at the time of his arrest, attempted to turn the car over to his attorney for delivery to his home does not in any sense equate this case with those in which a danger existed that a confederate in crime would destroy evidence if seizure were not accomplished immediately. No testimony has ever been tendered that this crime or its aftermath involved confederates, nor has it ever been suggested that the investigating officers believed as much in October of 1967. Surely, Petitioner does not suggest that Respondent's trial attorney, Mr. Scott, an officer of the court, would participate in the destruction of evidence. Surely, there is a difference between moving a car for the convenience of a client's family and spiriting it out of the jurisdiction. In any event, Mr. Scott did, under protest, turn over the keys and claim check to the police prior to the seizure of the automobile, thus removing even this theoretical exigency if we accept the Petitioner's prior argument that possession of these items effectively immobilized the vehicle.

The question then arises as to whether the officers, having forgone prior opportunity for more than eleven weeks to secure and execute a search warrant, can, in effect, create "exigent circumstances" simply by saying that at the particular instant they chose to seize the car they did not have sufficient knowledge of its location *at that moment* to enable them to secure a warrant, despite a general availability of the car at known locations and

knowledge of facts pertaining to probable cause long before that time. Given this reasoning, any warrantless search of a movable object could be justified by such a conveniently manufactured exigency.

But from a factual standpoint even this "exigency" did not exist. It is not disputed that during the course of the questioning on Tuesday, October 10th between the hours of 10:00 A.M. and 5:30 P.M. the investigating officials became aware of the exact location of the car and became possessed of the means of access to it, the keys and claim check. Respondent was, by this time, under arrest in the office of the Attorney General of Ohio, Division of Criminal Activities, and could not, in any event, have communicated with the mythical "confederate" postulated by the State of Ohio. Certainly, at this point in time, the police were in a position to seek a search warrant from a magistrate within Franklin County, the Municipal Court of which is located only a few blocks from the offices where the interrogation was being conducted.

If it is assumed, *arguendo*, that some exigency did exist, and that there was some real possibility of the disappearance of the car, despite the control by the police of the defendant, the keys, and the claim check, it is pertinent to discuss another alternative available to the police in the particular circumstances of this case—the surveillance of the car in the parking lot. Petitioner has argued, claiming support from *Chambers v. Maroney*, 399 U.S. 42 (1971)[4] that this would be indistinguishable from outright seizure and that this is not a permissible

[4] That the lower Courts are not totally clear upon the impact upon *Chambers, supra,* of *Coolidge, supra,* with respect to this issue is perhaps best demonstrated by the divergence in the majority and dissenting opinions in *U.S. v. Bozada*, 473 F.2d 389 (8th Cir. 1973).

alternative under the Fourth Amendment. Respondent suggests that the surveillance question, if not mooted, as Respondent believes it to be, by the lack of any real exigent circumstances here, is deserving of some discussion.

Police surveillance of the car in this case until a warrant could be applied for would not, under the limited circumstances of this case, have constituted "seizure" any more than surveillance of a suspect by the police constitutes "arrest" of that individual. It is within the legitimate purview of police authority to observe and investigate in order to obtain factual details for presentation to judicial officers responsible for making probable cause determinations. Observation alone here would have been sufficient to preserve the opportunity to secure and execute a warrant.

In what real way would the defendant's rights have been compromised? The defendant's privacy interest in the object would not have been violated. His ability to use the car was already foreclosed by his arrest. It would have, in this case, taken only a brief period of time to present the warrant arguments to a magistrate. If the warrant had been issued, defendant–and the public–would have had the benefit of a judicial determination of probable cause. If the warrant had not been issued, for failure of the alleged probable cause, an improper search would have thereby been prevented. In either event, the costs in terms of law enforcement resources would have been minimal, and the savings in terms of subsequent judicial labor would have been substantial.

Although the Respondent maintains, as did the District Court, that the initial seizure of the car from the downtown parking lot was the basic and incurable violation of Respondent's Fourth Amendment right and that all the events which flowed from it were necessarily tainted by it, the warrantless searches of and seizures from the car two days after it was taken to the Columbus

Police Impounding Lot most certainly cannot be justified in terms of any "exigency". At that point the police had absolute control of the vehicle and unlimited opportunity to secure a warrant, yet they simply did not trouble themselves to do so.

This case is not in any way analogous to the situation with which this Court dealt in *Chambers v. Maroney*, 399 U.S. 42 (1971), where the defendant was arrested in his car and the police, having proper authority to search the car incident to the arrest, merely moved it to the police station before doing so; here there was no foundation for a warrantless search at the point where the car was found and, therefor, no justification for a later search at the impoundment lot. Nor is the case comparable with the situation in *Cupp v. Murphy*, 412 U.S. 291 (1973), in which this Court approved, under *Chimel v. California*, 395 U.S. 752 (1969), the admission of evidence about scrapings from the defendant's fingernails given the true exigency of that situation and the extreme parishability of the evidence there in question.

C. The "Plain View" Exception to the Warrant Requirement Is Inapplicable on the Facts of the Case.

Petitioner also argues that the seized automobile was an instrumentality of the crime, found in plain view and seizable as such. This Court in *Coolidge* placed the so-called "plain view" exception in perspective:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertantly across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search

incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges . . .

* * * * *

The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view *alone* is never enough to justify the warrantless seizure of evidence . . .

* * * * *

The second limitation is that the discovery of evidence in plain view must be inadvertant . . . But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se* unreasonable" in the absence of "exigent circumstances."

Coolidge, supra, at pp. 466-471

As in *Coolidge*, the facts here simply do not support a "plain view" exception to the warrant requirement. The object involved was, as in *Coolidge*, an automobile, not "contraband or stolen goods or objects dangerous in themselves." The police had the information bearing upon probable cause to secure and execute a warrant for weeks. The police here also had a prior intention to seize the automobile, and their discovery of it was in no sense inadvertent. Moreover, the investigating officer here never actually saw the vehicle at all on the day of its seizure; he

merely had someone call for a wrecker to impound the vehicle. As the Sixth Circuit Court of Appeals suggests in its opinion:

> . . . Stated in its simplest form, there can be no "plain view" where there is no "view" at all. To attach such an extension to the plain view exception to the warrant requirement would undercut the very foundations of fourth amendment protections and consequently such a proposition is untenable . . .
>
> (Appendix to Pet. for Cert. p. 32)

Petitioner argues the inapplicability of the entire *Coolidge* doctrine to the instant case on a theory that the "viewing" and the seizure of the automobile here took place on "public" rather than "private" property. Respondent submits, however, that Petitioner is incorrect both as to its factual conclusion and as to its legal interpretation of the *Coolidge* decision.

From a factual standpoint, it is clear that the original seizure of the automobile took place upon an attended commercial parking lot on which Respondent had, in effect, rented space, locked his car and taken the keys with him. The very purpose of such a parking lot is to provide a kind of secure sanctuary for a person's chattle property away from the vulnerability of truly public areas. The situation is analogous to that in *Katz v. United States*, 389 U.S. 347, 885 S.Ct. 507, 19 L.Ed. 2d 576 (1967), where this Court held that conversation from a "public" telephone booth was subject to Fourth Amendment protection:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private even in an area accessible to the public may be constitutionally protected . . ."
>
> *Katz, supra,* at pp. 351-2

The *Coolidge* doctrine simply does not admit to the artificial "public" vs. "private" legal interpretation ascribed to it by the Petitioner.

D. There Was No Consent To Search.

At least in the way it has presented the facts of this case, if not directly in argument, the State of Ohio implies that defendant consented to the seizure and subsequent search of his automobile by making, according to police testimony, a request that his car be taken by the police for "safekeeping." It is sufficient here to note that the District Court took great pains to review all of the testimony pertaining to the claim of consent, and that it concluded from this review that, even if the testimony by defendant and his attorney disputing the alleged request were to be disregarded and only the police testimony considered, there still was a failure by the State ot demonstrate the clear and unequivocal consent necessary to justify a warrantless search. (Appendix to Pet. for Cert. pp. 52-55) The Court of Appeals found no need to re-examine this comprehensive decussion. (Appendix to Pet. for Cert. p. 30)

E. Petitioner's Contention That the Police Action Was Excused as "A Scientific Examination of an Instrumentality of a Crime" Is Not Valid.

Laced throughout Petitioner's other arguments is an elusive concept which seems to have been drawn somewhere from the recesses of *Warden v. Haden*, 387 U.S. 294 (1967) and *Cooper v. California*, 386 U.S. 58 (1967), in which Petitioner seeks to vindicate the taking of the automobile and the microscopic analysis of it's subsurface paint layers as merely a "scientific examination of an instrumentality of a crime" related to the "reason for which the car was seized and the defendant arrested." The argument seems to have several branches. In some

instances the State appears to be saying that, because this car was, in their view, an "instrumentality" of the crime and, because all that was done to it was to subject it, or a part of it, to scientific analysis, the Fourth Amendment does not really come into play at all, and there is not actually a seizure or search in any Constitutional sense. In other instances, however, the Petitioner takes another tact and suggests, without precisely saying so, that there was a search and seizure of Fourth Amendment significance but that it was, or ought to be, validated by a new exception to the warrant requirement revolving around the notion of "instrumentality." Respondent would suggest that these notions are first, inapplicable to the facts of the case, second, based upon inappropriate extrapolation from the caselaw cited, and third, suggestive of a procedure which, if sanctioned and applied generally, would severely damage Fourth Amendment values.

In the first place, it is at least arguable as to whether the car can accurately be classified as an "instrumentality of the crime" in this case. It was not the police theory here that the car they sought was the murder weapon itself; the killing had been done with a shotgun. The role of the car, according to police, was merely that it was used after the murder to push the victim's car over an embankment so that it could not be seen and then to leave the scene of the crime. In that sense, it is not the instrument of commission or the object of the crime itself but an evidentiary item.

But the distinction between an "instrumentality" and other items relating to a crime is of no importance in view of the holding of this Court in *Warden v. Haden*, 387 U.S. 294 (1967):

> Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or

> contraband. On its face, the provision assures the "right of people to be secure in their person, houses, papers, and effects . . . ." without regard to the use to which any of these things are applied . . .
>
> *Warden v. Haden, supra,* at p. 301

Warden v. Haden, as Respondent understands it, simply said that "mere evidence" can be seized in the same way and under the same restrictions as "instrumentalities." Petitioner seeks to invert that holding by asking the Court to re-establish the distinction between the types of seizable objects and to place "instrumentalities" in a category beyond the reach of Fourth Amendment protection. The suggestion ignores the underlying basis of the *Warden* decision which was that the Fourth Amendment was not directed to the issue of property but, rather, to the right of privacy:

> . . . [N]othing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the contrary may be true . . .
>
> *Warden, supra,* at p. 302

Petitioner's reliance on *Cooper v. California,* 386 U.S. 58 (1967) is similarly misplaced. Involved in *Cooper, supra,* was the search of a glove compartment of an automobile that had been impounded upon the defendant's arrest pursuant to a California statute authorizing impoundment pending forfeiture proceedings where a vehicle was involved in the transportation of narcotics. The impoundment here was based upon no such statutory authority. Similarly, the Court's recent decision in *Cady v. Dombrowski,* 413 U.S. 433 (1973) does not support Petitioner's case because there, as in *Cooper, supra,* the police had "exercised custody" over the vehicle on the highway and, in connection with that custody, had merely searched the car for a police service revolver they reasonably believed to be in the car and

which they feared might be stolen and in that search unexpectedly found incriminating evidence. Though these cases refer to the relationship between the reason for the searches and the reason for which the automobiles were being held, they are both founded upon situations, unlike the instant case, in which the police already had legitimate custody, of one sort or another, of the vehicle in question.

Finally, the words "scientific examination" do not, in and of themselves, impart some magic which counteracts Constitutional necessities as the Petitioner seems to imply. A search is not made legitimate in Fourth Amendment terms simply because it is done through a microscope rather than with the naked eye. In order to "scientifically examine" the layers of paint below the visible surface of the car here, it was necessary for the police to physically remove a portion of the paint from the car, and that removal, no matter how minute the sample, clearly constituted a seizure. See footnote 10 of the District Court's Opinion. (Appendix to Pet. for Cert. p. 50)

CONCLUSION

Petitioner has suggested to the Court that the tenor of the time bids a relaxation of strictures upon police conduct and has predicted that the loosening of the warrant requirements in cases such as this will "[s]eldom . . . interfere with the Fourth Amendment Rights of the innocent." (Petitioner's Brief, p. 30)

The Bill of Rights, written in times no less tumultous than our own, is not a quantative standard under which the security of the citizen is to be respected insofaras it may be practical, given temporal necessities. Rather, it provides an absolute standard forbiding in each instance and in each age the encroachment of the State upon individual perogative except within the narrow limits which it specifies.

The State of Ohio here asks this Court to approve the warrantless search and seizure of an automobile in circumstances which in no way necessitated the bypassing of warrant procedures. In the submission of Respondent, the Fourth Amendment does not and should not be held to encourage activity of the type here in question.

The decision of the United States District Court, affirmed by the United States Court of Appeals, directed that the writ of habeas corpus issue and that Arthur Ben Lewis, Jr. be released from custody unless the State of Ohio initiates action for a new trial within a stated period. Those decisions should be affirmed by this Court.

Respectfully submitted,

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